(3)

PETITION NO. 87 - 2029

SUPREME COURT OF THE UNITED STATES

OCTOBER 1987 TERM OF COURT

THOMAS W. HILL,

Petitioner-Plaintiff,

v.

DEPARTMENT OF THE AIR FORCE,
MERIT SYSTEMS PROTECTION BOARD,
PAUL S. BRITT, and
PAUL J. VALLERIE,

Respondents-Defendants.

ON WRIT OF CERTIORARI TO THE U.S. COURT

OF APPEALS FOR THE TENTH CIRCUIT

PETITIONER'S REPLY BRIEF, SEEKING SUMMARY DISPOSAL ON THE BASIS OF THE SUPREME COURT DECISION IN WEBSTER V. DOE

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PETITIONER'S REPLY TO OPPOSITION

1. In its opposition, Respondent has misstated the facts. At the minimum, Petitioner is entitled to acceptance of the facts as found by the District Court.

a. Respondent claims that Petitioner never disputed that he "improperly removed records from his supervisor's desk", and further claims that the issue was "fully adjudicated" before the MSPB. Both claims are blatantly false.

(1) In support of the MSPB appeal and timely-filed agency grievances Petitioner produced affidavits executed by Paul J. Vallerie, affirming that the records were his "personal notes" deliberately left at the Directorate. The agency refused to proceed with the grievance and the MSPB refused to consider the matter, ordering (MSPB Case DE07528510204 TAB 35),

> "The presiding official will not consider ... the merits of [Petitioner's] past dis-

> ciplinary record ... or the merits of his protected activities -- whistleblowing, grievances, FOIA and Privacy Act actions."

(2) The only review of the matter was provided by the District Court, which found (Pet. App. p. 3),

> "... Britt ... accused Plaintiff of theft for Plaintiff's removal of personal notes abandoned by a previous Directorate employee." [Emphasis added.]

(3) The theft charge was never before the MSPB, even though Petitioner demanded review. See MSPB Decision, supra, at TAB 57, pp. 6-7,

> " ... [A]ppellant is not charged with theft; instead appellant is charged with conversion. Therefore, the agency does not need to prove the criminal elements of theft."

(4) Notwithstanding the denial to Petitioner of any opportunity to refute the theft charge, agency officials have freely branded Petitioner as a thief

in their conversations and circulated documents. See, 16 June 1986 testimony of Paul Britt, Tr. 148-149; also Pl. Ex."10", Report of Arthur L. Staden, p. 4, Id.,

> " ... Dr Hill did steal personal files ... [and] he did steal services from the government ..."

b. Respondent has also claimed,

> "[Dr Hill] did not dispute that he had misused government telephone service."

Petitioner positively denied the misuse charge and produced documents, affidavits, regulations, and testimonies of other employees showing that unofficial use of the telephones and other equipment was routinely permitted. The MSPB Decision, supra, at TAB 57, pp. 5-8, states,

> "... [A]ppellant stated that the former DAS Director, COL Paul Vallerie, gave blanket approval for the use of the agency's telephone service. Appellant also claimed that Britt gave specific authority to use the telephone service.

> ... I am not persuaded by this defense. ...
>
> Appellant's second defense was that Britt used the Autovon service for personal calls on an extensive basis.
>
> ... I am not persuaded that Britt's conduct can excuse appellant's, even though Britt was the proposing official."

c. Respondent's claim that

> " ... [T]he Air Force determined that petitioner was untrustworthy and suspended his top secret security clearance ..."

is also false. The District Court has found that it was Paul S. Britt, and not the agency which acted. Pet. App. p. 7,

> "In retaliation for Plaintiff's charges Colonel Britt revoked Plaintiff's security clearance on May 24, 1985, asserting that the revocation was in the interest of national security and ... established a special security file on Plaintiff ... " [Emphasis added.]

d. Respondent is apparently attempting to downplay the severe damages

Petitioner has endured, by its claim that the "Z Code" indicates that the agency might possess information pertinent to Petitioner's suitability, and by claiming that the District Court concluded that the Air Force may have treated Petitioner arbitrarily. What the Court actually found (Pet. App. p. 9) is that

> " ... the 'Z code' indicates that Plaintiff has left the employ of the agency and that the agency possesses derogatory data regarding Plaintiff's suitability for a security clearance; that the 'Z code' has damaged Plaintiff and precluded his employment in the defense community although Plaintiff's capabilities are in demand."
>
> "The Court's preliminary findings also support that Plaintiff was treated in a purposefully discriminatory and arbitrary fashion, with a stated intent to "get" the Plaintiff. Such conduct would not be rationally related to legitimate government purposes and implicates a violation of equal protection." Id., p. 29.

2. Respondent has argued in its Opposition that the recent decision in Webster v. Doe, S. Ct. No. 86-1294 (decided 15 June 1988) is not controlling herein. However, the conflict between the Tenth Circuit decision regarding constitutional rights and the Supreme Court holdings in Webster could not be more obvious.

a. The gut issue of this petition is entitlement to District Court review under fifth amendment claims of denial of due process and equal protection of the law, following exhaustion of adminisministrative remedy. On the basis of adduced facts, the District Court found

> "Plaintiff's work opportunities have been severely limited by a fact determination which failed to comport with the traditional ideas of fair procedure; and that Defendants have failed to observe even the most minimal due process procedures in revoking Plaintiff's security clearance." Pet. App. p. 12.

Upon the limited remand the Court held,

> "The Court finds that Plaintiff has alleged cognizable liberty and property interests under the due process clause that are independently deserving of protection. ... The Court further finds that Plaintiff has presented a colorable claim that the suspension of his access to classified materials infringed on a liberty interest. The government's placing of Plaintiff's security file in an unadjudicated or incomplete status and disseminating such information impugn the Plaintiff's standing and reputation and limits his ability to secure employment." Id., p. 28-29.

With regard to potential for administrative relief the District Court found,

> " ... that Plaintiff was not given any opportunity to answer the allegations or otherwise contest the revocation." Id., p. 7.

> "[I]t is the Court's understanding that the Merit Systems Protection Board, who entertained Plaintiff's appeal of the removal decision, declined to review the security clearance issues." Id., p. 27.

b. The Tenth Circuit did not regard the factual findings as being arbitrary, but rather decided that any relief available to Petitioner was foreclosed by Federal Circuit review of the MSPB administrative process (which excluded security issues), and held (Id., pp. 51-52),

> "The findings of the MSPB were upheld on appeal and are conclusive and binding on us, Hill, and the Air Force."

Regarding Petitioner's claim of jurisdiction of the unresolved security matter on constitutional grounds, the Circuit Court concluded (Id., p. 54),

> "We hold that no jurisdiction was conferred on those grounds.
>
> To summarize, the district court improperly based its jurisdiction upon constitutional grounds ..."

c. However, the Webster decision has reinforced the Supreme Court's steadfast position that constitutional

rights are a proper jurisdictional basis for equitable relief, notwithstanding provisions of the National Security Act, and even though review under the Administrative Procedure Act ("APA") is precluded by provisions of that statute. See, Webster, slip opinion, at p. 8; pp. 10-11,

> "Nothing in § 102(c) [of the National Security Act of 1947] persuades us that Congress meant to preclude consideration of colorable constitutional claims arising out of the actions of the [CIA] Director pursuant to that section; we believe that a constitutional claim based on an individual discharge may be reviewed by the District Court. ...
>
> ... [T]he District Court should thus address respondent's constitutional claims and the propriety of the equitable remedies sought."

d. The Tenth Circuit decision is defective in terms of the standard set by the Supreme Court at p. 10 of Webster,

> "We emphasized in Johnson v. Robinson, 415 U.S. 361 (1974), that where Congress

> intends to preclude judicial review of constitutional claims its intent to do so must be clear. Id., at 373-374. In Weinberger v. Salfi, 422 U.S. 749 (1975), we reaffirmed that view. We require this heightened showing in part to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim. See Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 681, n.12 (1986)."

The Tenth Circuit Order has not addressed Congressional intent and precludes the District Court from considering involved statutory and constitutional issues.

(1) Petitioner has alleged (District Court Dkt. No. 28) that the action was taken under the provisions of 5 U.S.C. § 7532, i.e., the National Security Act. In Answer (Id., Dkt. No. 38), the Respondent has denied the allegation, but has anomalously claimed that the adverse security action was totally inde-

pendent of the action taken under provisions of 5 U.S.C. § 7512. See, generally Cole v. Young, 351 U.S. 536 (1956).

(2) The Circuit Court has also denied Petitioner any opportunity to show his expectation of security procedure under the circumstances. Petitioner has claimed that the norm is de-briefing, and not adverse an security action. See, Perry v. Sindermann, 408 U.S. 593, 601 (1972),

> "We have made clear in Roth, [408 U.S. 564 (1972)], at 571-572, that 'property' interests subject to procedural due process protection are not limited by a few rigid technical forms. Rather, 'property' denotes a broad range of interests that are secured by 'existing rules or understandings' Id., at 577. A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing."

3. Respondent's vacuous assurance that any adverse impact on Petitioner's present security clearance will be subject to extensive 32 C.F.R. 155 procedural safeguards before the federal DISCO is anomalous. These are, in fact, the same procedures which are guaranteed by AFR 205-32, but have been denied to Petitioner. If the Appellate Court Order is not reversed, 32 C.F.R. 155 procedures will be denied under this same argument, i.e., that preclusive effect must be given to the MSPB decision, which allegedly "fully adjudicated" the matter.

Wherefore, Petitioner prays that the Court will not be insensitive to his constitutional right of equitable relief, and will summarily reverse the Circuit Court Judgment on the authority of Webster v. Doe.[1/] In the alternative, the Court should grant certiorari since the Tenth Circuit decision is in conflict

with other Appellate Court decisions, and has also decided the issue of the extent of due process rights in security clearance procedures. [2], [3]

Respectfully submitted,

Thomas W. Hill

Thomas W. Hill, Pro Se

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[1] On 31 July 1988, on the basis of the Webster decision, Petitioner submitted a second petition for rehearing to the Tenth Circuit accompanied by a motion for leave to file the same. See, Alphin v. Henson, 552 F.2d 1033 (4th Cir. 1977), cert. denied, 434 U.S. 823. As of the date of this Reply Petitioner has not received a response to the submission.

[2] Contrary to the Tenth Circuit decision there is nothing in Dept. of the Navy v. Egan, S.Ct. No. 86-1552 (23 Feb. 1988), which sanctions agency violations of its own regulatory procedural process, or permits waiver because of inability to restore the status quo ante. Respondent is in fact arguing that Petitioner's constitutional rights are "a matter of no continuing importance".

[3] As stated in the Petition, the gravamen of this matter is not the dissolution of the preliminary injunction (as misstated by Respondent), but rather the mandate to dismiss with prejudice a well-pled constitutional cause.

DECLARATION OF SERVICE

Pursuant to the provisions of 28 U.S.C. § 1746, I hereby declare service of the foregoing reply on the opposing parties by first-class mailing of true copies to:

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